

# SENATE BILL No. 305

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## DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 30-4-3.

**Synopsis:** Nontrustee fiduciaries. Defines certain categories of nontrustee fiduciaries. Specifies certain powers and duties of nontrustee fiduciaries with respect to the administration of trusts. Provides limitations on the liability that may be imposed upon nontrustee fiduciaries in the exercise of their powers and performance of their duties. Provides limitations on the liability that may be imposed on trustees with respect to their interaction with nontrustee fiduciaries. Specifies rules governing the choice of law with respect to nontrustee fiduciaries.

**Effective:** July 1, 2015.

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**Bray**

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January 8, 2015, read first time and referred to Committee on Civil Law.

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First Regular Session 119th General Assembly (2015)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2014 Regular Session and 2014 Second Regular Technical Session of the General Assembly.

## SENATE BILL No. 305

A BILL FOR AN ACT to amend the Indiana Code concerning trusts and fiduciaries.

*Be it enacted by the General Assembly of the State of Indiana:*

- 1 SECTION 1. IC 30-4-3-0.5 IS ADDED TO THE INDIANA CODE  
2 AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY  
3 1, 2015]: **Sec. 0.5. The following definitions apply throughout this**  
4 **chapter:**  
5 (1) "Administrative trustee" means a trustee whose powers  
6 and duties are expressly limited under the terms of the trust  
7 to one (1) or more of the following:  
8 (A) Holding custody of all or part of the assets of the trust.  
9 (B) Holding and managing cash and cash equivalent assets  
10 of the trust.  
11 (C) Keeping the records of the trust's administration,  
12 preparing and issuing any required accountings, and  
13 preparing and filing required tax returns.  
14 (D) Making distributions or expenditures only as and when  
15 directed by a nontrustee fiduciary.  
16 (E) Making distributions that:



(i) are mandatory under the terms of the trust; and

(ii) do not require the trustee to use discretion.

(F) Taking actions with respect to the purchase, sale, exchange, retention, or diversification of trust assets solely as directed by an investment manager.

(2) "Distribution director" means a nontrustee fiduciary who under the terms of the trust has the power to direct the amounts, timing, and purposes of distributions that a trustee makes to or for the benefit of any beneficiary.

(3) "Distribution trustee" means a trustee whose power and duties under the terms of the trust include a discretionary power to make distributions or expenditures to or for the benefit of any beneficiary of the trust.

(4) "Investment manager" means a nontrustee fiduciary who has either of the following sets of powers or duties under the terms of the trust:

(A) The power to hold and to manage particular assets of a trust with or without legal custody of those assets, including a portfolio of securities, stock, or other equity ownership interest in a closely held business entity.

(B) The power to direct a trustee to act or to refrain from acting regarding the purchase, sale, exchange, retention, or diversification of particular assets of the trust.

(5) "Nontrustee fiduciary" means a person:

(A) who is not a trustee; and

(B) to whom at least one (1) of the powers described in section 9.3 of this chapter is given under the terms of the trust.

(6) "Primary trustee" means the trustee among two (2) or more trustees of a particular trust that grants the trustees powers and duties that are not identical who, under the terms of the trust, has:

(A) the broadest powers;

(B) the fewest explicit limitations on the trustee's duties or responsibilities; or

(C) the duty to provide accountings and other information to the beneficiaries under section 6(b) of this chapter and IC 30-4-5.

(7) "Trust advisor" means a nontrustee fiduciary who, under the terms of the trust, has only the power to make suggestions or recommendations to the trustee regarding:

(A) a beneficiary's needs or interests;



(B) the exercise of the trustee's discretion; or

(C) both.

(8) "Trust protector" means a nontrustee fiduciary whose powers under the terms of the trust include any of the following:

(A) The power to direct the trustee to perform an act that the terms of the trust would otherwise prohibit.

(B) The power to prohibit the trustee from performing an act that the terms of the trust would otherwise permit or require the trustee to perform.

(C) The power to require the trustee to exercise or refrain from exercising the trustee's discretion in a particular manner.

(D) The power to require the trustee to postpone or to accelerate a distribution that the terms of the trust would otherwise require the trustee to make at a particular time or following a specific event, such as a beneficiary's exercise of a withdrawal right.

(E) The power to remove or replace any trustee, investment manager, investment advisor, trust advisor, or other nontrustee fiduciary.

(F) The power to make or to participate in determinations that a beneficiary of the trust has become incapacitated or disabled or has recovered from an incapacitating condition or disability.

(G) The power to amend the trust instrument or to direct a trustee to exercise an amendment power that the trust instrument gives to the trustee.

(H) The power to terminate the trust earlier than the terms of the trust would otherwise require.

(I) The power to change the situs of the trust or the choice of law governing the trust.

SECTION 2. IC 30-4-3-9 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 9. (~~Duty of Trustee under Control of Third Person~~)

(a) If the terms of the trust give a person a power to direct the trustee in the administration of the trust and those terms expressly direct the trustee to rely, or relieve the trustee from liability if ~~he~~ **the trustee** does rely, on that person's directions, the trustee may do so and will incur no liability for any loss to the trust estate.

(b) If the terms of the trust give a person a power to direct the trustee in the administration of the trust, except as provided in



subsection (a) of this section:

(1) If the person holds the power as a fiduciary, the trustee has a duty to refuse to comply with any direction ~~which he~~ **that the trustee** knows or should know would constitute a breach of a duty owed by that person as a fiduciary.

(2) If the person holds the power solely for ~~his~~ **the person's** own benefit, the trustee may refuse to comply only if the attempted exercise of the power violates the terms of the trust with respect to that power.

**(c) If a nontrustee fiduciary possesses and exercises a power to act independently with respect to the administration of a trust, the potential liability of the trustee to the beneficiaries of the trust is governed by section 9.4 of this chapter. For purposes of this subsection, the mere power to direct the trustee's actions is not considered a power to act independently with respect to the administration of the trust.**

SECTION 3. IC 30-4-3-9.1 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: **Sec. 9.1. (a) A person is not considered an investment manager unless the terms of the trust give the person exclusive control and responsibility for particular assets of the trust or assets of a specified type to the extent that the trustee has no duty to monitor or supervise the actions of the person.**

**(b) This subsection applies to a distribution director of a trust that consists of a group or a committee of two (2) or more persons. Unless the terms of the trust provide otherwise:**

**(1) a majority vote, in the case of a distribution director consisting of at least three (3) persons; or**

**(2) a unanimous vote, in the case of a distribution director comprised of two (2) persons;**

**is required for the distribution director to exercise a power under this article.**

**(c) If more than one (1) trustee could be considered the primary trustee of a trust under section 0.5(6) of this chapter, the primary trustee is the trustee who satisfies the most requirements under section 0.5(6) of this chapter.**

**(d) The terms of a trust may describe or identify a nontrustee fiduciary with a term or phrase other than a term or phrase defined by section 0.5 of this chapter. The type and status of the nontrustee fiduciary is determined according to the powers and duties conferred upon the nontrustee fiduciary by the terms of the trust regardless of the term or phrase used to describe or identify**



1 the nontrustee fiduciary.

2 (e) A person is not considered a nontrustee fiduciary with  
3 respect to a trust if that person holds only a power, exercisable in  
4 a nonfiduciary capacity, to appoint trust property.

5 SECTION 4. IC 30-4-3-9.2 IS ADDED TO THE INDIANA CODE  
6 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY  
7 1, 2015]: Sec. 9.2. (a) The duties of a nonfiduciary trustee set forth  
8 in this section may not be altered by a trust instrument.

9 (b) A nontrustee fiduciary has the following duties:

10 (1) A duty to act in good faith and in a manner that the  
11 nontrustee fiduciary reasonably believes is consistent with the  
12 purposes of the trust and the best interests of all beneficiaries  
13 whose rights could be affected by the exercise of the  
14 nontrustee fiduciary's powers.

15 (2) A duty to refrain from any conduct that would constitute  
16 an act of self-dealing prohibited by section 7 of this chapter,  
17 if the conduct were performed by a trustee.

18 (3) A duty to refrain from reckless or willful misconduct.

19 (c) The terms of a trust may impose a higher or more stringent  
20 standard of care upon a nontrustee fiduciary than the standard of  
21 care imposed by this section. The court may hold a nontrustee  
22 fiduciary liable to a beneficiary for breaching a duty imposed  
23 under subsection (b) or another duty stated expressly in the terms  
24 of the trust, if the beneficiary proves the breach and the resulting  
25 injury or damage by clear and convincing evidence.

26 (d) If the terms of the trust do not specify the potential liability  
27 of a nontrustee fiduciary to a beneficiary of the trust, the following  
28 apply:

29 (1) The court may hold the nontrustee fiduciary liable to a  
30 beneficiary for injury or damage proximately caused by the  
31 nontrustee fiduciary's actual fraud or deception, as proven by  
32 clear and convincing evidence.

33 (2) If the terms of the trust give the nontrustee fiduciary  
34 unlimited, sole, or absolute discretion to make a  
35 determination, take an action, or refrain from acting, the  
36 court may not hold the nontrustee fiduciary liable to a  
37 beneficiary on a claim that the nontrustee fiduciary has  
38 exercised or refrained from exercising the discretion in an  
39 arbitrary, capricious, abusive, unreasonable, or unfair  
40 manner, unless the beneficiary proves by the clear and  
41 convincing evidence that the nontrustee fiduciary acted or  
42 refrained from acting with a malicious intent to harm the



beneficiary.

However, the limitations on the liability of a nontrustee fiduciary imposed by this subsection do not apply to the potential liability of the nontrustee fiduciary for a breach of a duty described in subsection (b).

(e) If a nontrustee fiduciary is uncertain about whether a proposed action or a decision not to act would violate a duty imposed upon the nontrustee fiduciary or exceed the powers of the nontrustee fiduciary, the nontrustee fiduciary may petition the court for instructions under section 18(a) of this chapter as if the nontrustee fiduciary were a trustee. Except as prohibited by the terms of the trust, the court may direct that the nontrustee fiduciary's reasonable attorney's fees and costs in the proceeding be paid from trust property.

SECTION 5. IC 30-4-3-9.3 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 9.3. A trust instrument may contain one (1) or more of the following regarding the rights, powers, and duties of a nontrustee fiduciary:

- (1) A provision conferring powers on a distribution director, an investment manager, a trust advisor, or a trust protector.
- (2) A provision entitling the nontrustee fiduciary to receive any accountings that are required or permitted to be given to a beneficiary.
- (3) A requirement that the nontrustee fiduciary keep well informed about:
  - (A) the nature, value, and condition of the trust assets; and
  - (B) the needs and circumstances of the beneficiaries whose rights could be affected by the exercise of the powers of the nontrustee fiduciary.
- (4) An authorization for the nontrustee fiduciary to obtain legal or other professional advice, at the trust's expense, with respect to the exercise of the nontrustee fiduciary's powers or the performance of the nontrustee fiduciary's duties.
- (5) A provision entitling the nontrustee fiduciary to receive reasonable compensation or reimbursement for expenses, or both.
- (6) A provision entitling the nontrustee fiduciary to receive indemnification from the trust assets with respect to specified claims or objections made by a beneficiary or third party.
- (7) A prohibition on reviewing or reversing an act, an omission, or a determination of the nontrustee fiduciary as an



abuse of the nontrustee fiduciary's discretion.

(8) A provision protecting a nontrustee fiduciary from liability for any act or omission that is merely negligent.

(9) A provision protecting a trustee from liability to any beneficiary as a result of following a mandatory direction or recommendation by the nonfiduciary trustee unless section 9 or 9.4 of this chapter would impose liability on the trustee.

(10) Provisions governing the appointment, resignation, removal, or replacement of a nontrustee fiduciary, with or without the intervention or approval of a court.

(11) A provision specifying the law of the jurisdiction that applies to the powers and duties of a nontrustee fiduciary.

(12) A provision permitting or requiring the nontrustee fiduciary to enter into a separate agreement with any trustee or with another nonfiduciary trustee for the purpose of addressing administrative and practical issues presented by the respective powers and duties of each nontrustee fiduciary or trustee who signs the agreement.

(13) Any other provision regarding the powers and duties of a nontrustee fiduciary as long as the provision does not conflict with section 9.2 of this chapter.

SECTION 6. IC 30-4-3-9.4 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: **Sec. 9.4. (a) If:**

(1) a nontrustee fiduciary possesses and exercises a power to direct the trustee's actions in the administration of the trust; and

(2) the terms of the trust do not expressly limit the trustee's liability as permitted by section 9(a) of this chapter;

the trustee's freedom to refuse to comply with the direction of the nontrustee fiduciary is governed by this section and section 9(b) of this chapter. Subsections (b), (c), (d), and (e) also apply when a nontrustee fiduciary possesses the power to act independently with respect to the administration of a trust.

(b) A trust instrument may specifically provide that a trustee has no duty to monitor the activities of a nontrustee fiduciary.

(c) A trust instrument may specifically provide that a trustee has no liability to beneficiaries as a result of a nontrustee fiduciary's breach of a duty imposed by section 9.2 of this chapter or the terms of the trust instrument, even if the trustee knew or should have known of the breach.

(d) If the trust instrument is silent about the liability of a trustee





to the beneficiaries as a result of a breach of duty by a nontrustee fiduciary, the following apply:

(1) The trustee has no duty to monitor the activities of the nontrustee fiduciary.

(2) The trustee has no liability to the trust's beneficiaries as a result of a breach of duty by the nontrustee fiduciary unless the trustee had:

(A) actual knowledge of the breach of duty; and

(B) the power and the opportunity to prevent or redress the breach of duty by filing an appropriate proceeding or taking other appropriate action.

(e) In the absence of clear and convincing evidence to the contrary:

(1) a trustee's action in response to advice or directions by a nontrustee fiduciary, including the trustee's confirmation that the directions have been carried out and any recording or reporting of the trustee's responsive actions, must be presumed to be administrative actions taken by the trustee solely to allow the trustee to perform the duties assigned to the trustee under the terms of the trust; and

(2) the responsive actions of the trustee described in subdivision (1) do not constitute an undertaking of the trustee to monitor the nontrustee fiduciary or to otherwise participate in activities within the scope of the nontrustee fiduciary's powers or authority.

(f) If a nontrustee fiduciary has the power to direct the trustee to act or to refrain from acting, the trustee is not liable to any beneficiary as a result of obeying the direction, unless the trustee's obedience to the direction constitutes willful misconduct toward a beneficiary of the trust.

SECTION 7. IC 30-4-3-9.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 9.5. (a) This section applies if:

(1) the primary trustee of a trust and a nontrustee fiduciary are residents of different jurisdictions; or

(2) the trust instrument does not expressly identify the jurisdiction whose law applies to the powers and duties of the nontrustee fiduciary.

(b) If a nontrustee fiduciary resides in Indiana and at least one (1) beneficiary of the trust resides in Indiana, this chapter governs the interpretation and exercise of that nontrustee fiduciary's powers and duties unless applying the rules of law in this chapter



1 would:

- 2 (1) clearly violate a purpose of the trust; or  
3 (2) be contrary to the public policy of another jurisdiction  
4 that is the principal place of administration of the trust (as  
5 defined by IC 30-4-6-3(b)).

6 (c) If the principal place of administration of the trust is in  
7 Indiana, if a nontrustee fiduciary resides in another jurisdiction,  
8 and if at least one (1) beneficiary resides in that other jurisdiction,  
9 the rules of law in that other jurisdiction apply to the powers and  
10 duties of that nontrustee fiduciary unless the rules of law in that  
11 other jurisdiction would:

- 12 (1) conflict with section 9.2 of this chapter; or  
13 (2) be contrary to the public policy of Indiana.

14 (d) If:

- 15 (1) the conditions or circumstances described in subsection (c)  
16 exist with respect to a nontrustee fiduciary who resides in  
17 another jurisdiction; and  
18 (2) that other jurisdiction has no specific rules of law that  
19 apply to nontrustee fiduciaries;

20 the rules of law in this chapter apply to the powers and duties of  
21 that nonresident nontrustee fiduciary.

